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Not-For-Profit and Charitable Coalition

CG Docket No. 02-278

CC Docket No. 92-90

FCC 02-250

November 22, 2002

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Before The  
Federal Communications Commission  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

CC Docket No. 92-90

FCC 02-250

**COMMENTS OF THE NOT-FOR-PROFIT AND CHARITABLE COALITION**

Glenn A. Mitchell, Esq.  
Andrew M. Beato, Esq.  
Stein, Mitchell & Mezines L.L.P.  
1100 Connecticut Avenue, NW  
Suite 1100  
Washington, DC 20036  
(202) 737-7777

*Counsel for The Not-For Profit and  
Charitable Coalition*

Dated: November 22, 2002

## EXECUTIVE SUMMARY

Congress unambiguously exempted from the requirements of the Telephone Consumer Protection Act calls or messages by nonprofit organizations. The Commission also concluded that the TCPA nonprofit exemption extended to solicitations made by or on behalf of nonprofit organizations.

The Not-For-Profit and Charitable Coalition urges the Commission not to eliminate the TCPA nonprofit exemption, and not to impose an unconstitutional national “Do-Not-Call” registry on members of the Coalition. Nonprofit organizations and their professional fundraisers rely on telephone calls to current, former and prospective donors to communicate nonprofit messages and request financial support. A decision to eliminate the TCPA nonprofit exemption or require a “Do-Not-Call” registry would have devastating financial implications for nonprofit and charitable organizations. It would jeopardize the important missions fulfilled by nonprofit organizations, and it would substantially reduce financial support

The Coalition encourages the Commission to affirm the intent of Congress to protect non-commercial speech rights. Members of the Coalition and professional fundraisers acting on their behalf possess a constitutional right to solicit charitable contributions unencumbered by unconstitutional governmental restrictions. This constitutionally-protected non-commercial speech would be chilled impermissibly if the Commission eliminates the TCPA nonprofit exemption or requires Coalition members to adhere to a “Do-Not-Call” registry.

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**COMMENTS OF THE NOT-FOR-PROFIT AND CHARITABLE COALITION**

The Not-For-Profit and Charitable Coalition (“Coalition”), by undersigned counsel, submits its Comments in response to the Federal Communication Commission’s (‘Commission’) request for comments on the potential revision, clarification or adoption of additional rules implementing the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (“TCPA”).<sup>1</sup> The Coalition is composed of 277 national, state, and local nonprofit and charitable organizations with tax-exempt status under the United States Internal Revenue

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<sup>1</sup> See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 02-250, CG Docket No. 02-278 and CC Docket No. 92-90 (re. Sept. 18,2002) (“MO&O”); Notice of Proposed Rulemaking, 67 FED. REG. 62667 (Oct. 8,2002) (“Notice”).

Code, 26 U.S.C. § 501(c). Ex. A (identifying members of the Coalition).’ These organizations and their nonprofit and charitable objectives, as well as the more than 1,000,000 members affiliated with these groups, all will be harmed irreparably if the Commission adopts new implementing rules to eliminate the TCPA exemption for nonprofit and charitable organizations and their professional fundraisers who communicate with donors by telephone to solicit charitable contributions (“TCPA nonprofit exemption”)

Many different types of nonprofit and charitable organizations are represented in the Coalition. These organizations provide highly diversified program benefits to the public and their members. In addition to nationally oriented charities, the Coalition includes more than 180 statewide membership organizations representing hundreds of thousands of active and retired law enforcement officers, professional and volunteer fire fighters, Jaycees, and veterans. These groups are organized for nonprofit purposes and engage in numerous program activities for the benefit of their members and the general public

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<sup>2</sup> Exhibits A and B (attached) originally were filed by the Coalition as exhibits to the Coalition’s comment to the FTC opposing the proposed rulemaking to amend the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.* See Comments of the Not-for-Profit and Charitable Coalition in Response to the Federal Trade Commission’s Proposed Amendments to the Telemarketing Sales Rule, FTC File No. R41 1001 (Apr. 15, 2002), *available at* <http://www.ftc.gov/os/comments/dncpapercomments/04/notforprofit.pdf> (accessed Nov. 12, 2002).

The public benefits created by Coalition members are substantial and unparalleled. The various public safety organizations represent police chiefs, sheriffs, highway patrol, state and municipal police, narcotic officers, fire chiefs, professional fire fighters, paramedics and state investigatory personnel. **As** full-time public safety personnel, the organizations are a unique and unrivaled source of knowledge and expertise on law enforcement, the fire service, and emergency medical services. They offer advice and counsel on criminal apprehension, detention, enforcement, fire safety, delivery of fire fighting services, and anti-terrorism expertise. They provide invaluable training and education on topics such as enhancements in law enforcement and fire fighting technology which improve the quality of services realized by the public. And many of the organizations sponsor comprehensive public service and educational programs on issues such as seat belt usage, home fire prevention, alcohol abuse, safe driving, illegal drugs, missing children, and community policing.<sup>3</sup>

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<sup>3</sup> Thousands of charitable causes and state and local community programs are sponsored, supported or funded by these public safety organizations. A few examples illustrate the connection between the Coalition members and community programs. Professional fire fighters represented in the Coalition provide extensive volunteer and financial support for The Muscular Dystrophy Association, and similar national support is provided by law enforcement organizations to the Special Olympics. Other examples include death benefit and benevolent programs for public safety officers killed or injured in the line of duty, scholarship programs for high school students, summer camps for underprivileged youths, hospital visits to children with terminal illnesses, and support of burn camps and burn victims.

The Coalition also includes state military veterans organizations affiliated with the American Legion. Veterans of Foreign Wars, Disabled American Veterans, AMVETS. and the Vietnam Veterans of America. Together, these organizations facilitate, support, and fund countless public initiatives such as emergency financial aid; relocation, medical, employment and educational services for veterans; support for orphans and widows of veterans killed in the line of duty; assistance to disabled veterans in securing Veteran's Administration benefits and obtaining medical treatment, coordinating volunteer efforts that provide hundreds of thousands of hours of non-compensated services to hospitals; assisting veterans in obtaining employment; and providing transitional housing for homeless veterans.

The Coalition urges the Commission not to remove the exclusion from the definition of "telephone solicitation" calls or messages by or on behalf of nonprofit organizations. By necessity or choice, nonprofit organizations rely on professional fundraisers to solicit by telephone financial support on their behalf. An estimated 60 percent to 70 percent of nonprofit and charitable organizations use professional fundraisers to deliver their messages to consumers and solicit donations. Jeff Jones, *Do Not Call: Proposed FTC Rules Could Hurt*, THE NONPROFIT TIMES (Mar. 2002) (citing Paulette Maehara, CEO of the Association of Fundraising Professionals). Many of these organizations are voluntary and have few staff members. They simply do not have the infrastructure, personnel, operational efficiencies, and

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expertise to impart the fundraising message currently imparted by professional fundraisers.

Ex. B. Suhrke Decl. ¶ 7.

Eliminating the TCPA nonprofit exemption would have daunting financial implications for nonprofit and charitable organizations. Ex. B. Suhrke Decl. ¶¶ 4-6. Without funding, the important missions fulfilled by these organizations will be jeopardized. In 2001, Americans gave an estimated \$221 billion to 1.23 million nonprofit and charitable organizations. An inevitable consequence of eliminating the TCPA nonprofit exemption will be a substantial reduction in nonprofit and charitable support.<sup>4</sup> Ex. B, Suhrke Decl. ¶ 5. This translates into a reduction, if not elimination, of the main source of revenue for members of the Coalition.

Ultimately, the TCPA nonprofit exemption reflects the Congressional desire to protect non-commercial speech rights enshrined in the First Amendment. Members of the Coalition possess a constitutional right to free speech under the First Amendment which includes the

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<sup>4</sup> By way of example, it is estimated that the national Do-Not-Call registry proposed by the Federal Trade Commission will limit the potential donor pool between 40 percent to 50 percent from current levels. See Federal Trade Commission, *Fiscal Year 2003 Congressional Justification Budget Summary*, at 6 (“The FTC estimates that up to 40 percent of all households in the United States would opt to be included on the Do-Not-Call list”). In reality, that may be a conservative estimate based on reported 70 percent to 80 percent opt out rates in some states. Matt Moore, *State Can Block Some Telemarketers – For a Price*, THE NEWS HERALD, Jan. 22, 1998, in News Herald: Local News (visited Mar. 25, 2002) <<http://www.newsherald.com/archive/local/tm012298.html>.



right to solicit charitable contributions unencumbered by unconstitutional governmental restrictions. This protected right has been upheld repeatedly by the Supreme Court. *See Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988); *Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). The First Amendment protections apply not only to nonprofit and charitable organizations soliciting donations directly, but also to for-profit professional fundraisers acting on their behalf. *Riley*, 487 U.S. at 798 (“Whether one views this as a restriction of the charities’ ability to speak. . . or a restriction of the professional fundraisers’ ability to speak. . . the restriction is undoubtedly one on speech, and cannot be countenanced here”) (internal citations omitted). This constitutionally-protected noncommercial speech would be chilled impermissibly if the Commission eliminates the TCPA nonprofit exemption or requires Coalition members to adhere to a “Do-Not-Call” registry.

The Coalition strongly encourages the Commission to heed the call ~~of~~ the federal government that Americans stand together as “Armies of Compassion” and increase charitable giving. This message of increased support of charities, with the commensurate removal of government-imposed barriers to charitable giving, is reflected in President Bush’s call for the federal government to do more, not less, to encourage charitable giving:

But in order to make sure the home front is secure, in order to make sure that we don't allow the terrorists to achieve any objective, Americans must give generously. . . . Community-based programs that help make their neighborhoods a better place for all. . . . And so, I hope America— I encourage America —that as we head into Thanksgiving, to find a program that needs help. . . . ***There is a role for the federal government in making sure that charitable organizations thrive and flourish. . . . We must also promote more private sector giving, besides just words of encouragement.***

Office of the Press Secretary, *President Urges Support for America's Charities* (Nov. 20, 2001) <<http://www.whitehouse.gov/news/releases/2001/11/print/20011120-5.html>> (visited Mar. 19, 2002) (emphasis added).<sup>5</sup>

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<sup>5</sup> See also Office of the Press Secretary, *President's Letter on "Armies of Compassion" Bill* (Nov. 7, 2001) <<http://www.whitehouse.gov/news/releases/2001/11/print/20011108-2.html>> (visited Mar. 19, 2002) ("We must pass and sign into law an "Armies of Compassion" bill this year that encourages and supports charitable giving, removes unneeded barriers to government support for community and faith-based groups, and authorizes important initiatives to help those in need"); Office of the Press Secretary, *Rallying the Armies of Compassion* (Jan. 2001) <<http://www.whitehouse.gov/news/reports/faithbased.htm>> (visited Mar. 19, 2002) (discussing the elimination of federal government barriers to faith-based and community-based charitable giving and proposing numerous measures designed to encourage increased private charitable giving"); Office of the Press Secretary, *Executive Order of January 29, 2001: Establishment of White House Office of Faith-Based and Community Initiatives* (Jan. 29, 2001) <<http://www.whitehouse.gov/news/releases/2001/01/print/20010129-2.html>> (visited Mar. 19, 2002) (creating the White House Office of Faith-Based and Community Initiatives with the principal functions of encouraging private charitable giving to support faith-based and community initiatives and eliminating unnecessary legislative, regulatory, and other bureaucratic barriers that impede effective faith-based and other community efforts to solve social problems); Office of the Press Secretary, *The President's Agenda for Tax Relief* <<http://www.whitehouse.gov/news/reports/taxplan.html>> (visited Mar. 19, 2002) ("Thus, to encourage an outpouring of giving, President Bush's plan will expand the

**I. The Commission's Limited **Review of** the TCPA Nonprofit Exemption **Does** not Extend to Non-Commercial Calls and Messages Whether by Nonprofits or Professional Fundraisers Acting on Their Behalf**

The TCPA excludes calls or messages by nonprofit organizations from the definition of "telephone solicitation."<sup>6</sup> Following notice and comment by interested parties, the Commission clarified that "telephone solicitations made by or on behalf of tax-exempt nonprofit organizations are not subject to our rules governing telephone solicitations."<sup>7</sup> These calls were exempted because the "TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities," and "the Commission found no evidence

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federal charitable deduction to non-itemizers. This change will allow every taxpayer to deduct his or her charitable donations and will generate billions of dollars annually in additional charitable contributions. The President also supports other proposals to increase charitable giving").

<sup>6</sup> Telephone solicitation is defined as "the initiation of a telephone call or message for the purpose of encouraging the purchase **or** rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message **(A)** to any person with that person's prior express invitation or permission, **(B)** to any person with whom the caller has an established business relationship, or **(C)** *by a tax exempt nonprofit organization*." 47 U.S.C. § 227(a)(3) (emphasis added). The Commission also determined that calls by nonprofit organizations are exempt from the prohibition on prerecorded messages because they inherently are non-commercial. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Rept. and Order, 7 FCC Rcd 8752, 8773-74, para. 40. See also Notice, 67 FED. REG. at 62673, para. 23.

<sup>7</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Mem. Op. and Order, 10 FCC Rcd 12391, 12397, para. 13 (1995).

to show that non-commercial calls represented as serious a concern for telephone subscribers as unsolicited commercial calls.’‘ Notice. 67 FED. REG. at 62673, para. 23.

The Commission now seeks comment on a limited application of the TCPA nonprofit exemption, specifically, “calls made jointly by nonprofit and for-profit organizations and whether they should be exempt from the restrictions on telephone solicitations and pre-recorded messages.” Notice, 67 FED. REG. at 62673, para. 23. It is important to emphasize that the Commission does not propose the elimination of the TCPA nonprofit exemption. Comment is not requested on the TCPA nonprofit exemption as applied to telephone calls involving political and religious non-commercial speech. Notice, 67 FED. REG. at 62673, para. 23 (footnote omitted). The Commission clearly states that the TCPA nonprofit exemption for the non-commercial speech imparted during political and religious calls is not subject to review. Nor is comment requested on legitimate calls conveying nonprofit and charitable messages and seeking financial support, whether such calls are made by **or** on behalf of the nonprofit.\* Instead, the Commission focuses on the limited application of the TCPA nonprofit

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<sup>8</sup> The Commission correctly excludes from this proceeding telephone communications by or on behalf of nonprofit organizations which convey legitimate nonprofit messages and request public support. As discussed, *infra*, the non-commercial speech conveyed during such calls is protected under the First Amendment. Indeed, the TCPA protects consumer privacy during telephone solicitations while balancing privacy and free speech rights. Congress expressly found that “[i]ndividuals’ privacy rights, public safety interests, and commercial

exemption to situations were “the provider of an otherwise commercial message seeks to immunize itself by simply inserting purportedly ‘non-commercial’ content into that message,” for example, where “a nonprofit organization calls consumers to sell another company’s magazines and receives a portion of the proceeds. . . .” Notice, 67 FED. REG. at 62673-74, para. 23

The Coalition does not challenge the Commission’s assertion of enforcement authority in the limited situation described above, that is, where a commercial-based telephone call (e.g., selling a good such as a magazine) is shrouded by a nonprofit’s status. **As** the Commission notes, it “will not hesitate to consider enforcement action should the provider of an otherwise commercial message seek to immunize itself by simply inserting purportedly ‘non-commercial’ content” during the telephone call. Notice, 67 FED. REG. at 62673-74, para. 23. Indeed, the TCPA nonprofit exemption should not function as an artifice for an inherently commercial enterprise operating under the pretext of a nonprofit safe harbor.

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freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.” *See* TCPA, Section 2(9), *reprinted in* 7 FCC Rcd 2736, at 2744. The FCC was instructed to consider telemarketing restrictions that are “consistent with the constitutional protections of free speech.” *Id.* Section 2(15). Paramount among these free speech rights is the non-commercial speech exercised by members of the Coalition.

However, it frequently is difficult to determine whether a non-commercial, nonprofit and charitable message or commercial solicitation is the focus of a telephone communication. For this reason, the Commission should resist “bright-line” distinctions which invariably cannot account for the varying form and substance of a telephone solicitation, particularly where Congress clearly intended to grant **an** unqualified exemption from the definition of “telephone solicitation” to nonprofits without regard to the content of the telephone call. See 47 U.S.C. § 227(a)(3) (defining telephone solicitation is “the initiation of a telephone call or message for the purpose of encouraging the purchase . . . of . . . property, goods, or services but such term does not include a call or message . . . *by a tax exempt nonprofit organization*”) (emphasis added).

## **II. Eliminating the TCPA Nonprofit Exemption Would Have a Devastating Impact on Nonprofit and Charitable Organizations**

Although the Commission professes no intention to eliminate the TCPA nonprofit exemption for telephone calls involving non-commercial speech: the Coalition takes this opportunity to inform the Commission that eliminating the TCPA nonprofit exemption would

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<sup>9</sup> See *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 02-250, CG Docket No. 02-278 and CC Docket No. 92-90, para. **56** (re. Sept. 18, 2002) (“The Commission has concluded, however, that its regulations under the TCPA apply only to commercial calls”).

be devastating for members of the Coalition in terms of funding, fulfillment of their mission objectives, and dissemination of their message. Many nonprofit and charitable organizations have built constituencies through grass roots support. Telephones are the most practical and cost effective interactive medium for these organizations in recognition of the fact that direct (e.g., face-to-face) solicitation is logistically impossible and direct mail is cost prohibitive. Ex. B, Suhrke Decl. ¶ 5. Telephone solicitation confers obvious benefits. Trained professional fundraisers deliver prepared scripts, often created or approved by the nonprofit and charitable clients, to communicate the clients' messages. Most states require registration, bonds, and point-of-solicitation disclosures.<sup>10</sup> Ultimately nonprofit and charitable organizations realize substantial benefits from this process including (1) donations from consumers to support the needs of the organization, and (2) delivery of the central message of the nonprofit and charitable organization during the telephone solicitation and in subsequent written correspondence. **Ex. B**, Suhrke Decl. ¶¶ 5-6.

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<sup>10</sup> Solicitations on behalf of nonprofit and charitable organizations are regulated extensively under state law. Ex. B, Suhrke Decl. ¶ 10. Virtually all states impose statutory and regulatory requirements on professional fundraisers soliciting donations on behalf of nonprofit and charitable organizations such as registration and licensing, posting of bonds, point-of-solicitation disclosures, fraud protection provisions, record keeping provisions, and annual reporting of financial information. **Ex. B**, Suhrke Decl. ¶ 10. These requirements serve numerous functions. They offer public information on the activities of charities, and they also allow state enforcement authorities to identify violations and prosecute where necessary.

Nonprofit and charitable organizations rely on the expertise and operational efficiencies of professional fundraisers to conduct their fundraising campaigns and disseminate their message. Ex. B, Suhrke Decl. ¶¶ 5-6. There are obvious advantages to this approach. Successful and cost-effective fundraising requires basic resources and specialized knowledge that nonprofit and charitable organizations typically lack. Ex. B, Suhrke Decl. ¶ 5. For example, there must be a substantial investment of capital, a highly trained and supervised work force, and thorough knowledge of the state and federal regulatory requirements. Ex. B, Suhrke Decl. ¶ 5. Such trained professionals offer significant resources, expertise and operational efficiencies that cannot be duplicated by nonprofit and charitable organizations. Ex. B, Suhrke Decl. ¶ 7. Indeed, approximately 60 percent to 70 percent of all nonprofit and charitable organizations rely on professional fundraisers because doing so permits the organization to focus its expertise and limited resources on implementing their program missions. Ex. B, Suhrke Decl. ¶ 5.

**III. Imposing a “Do-Not-Call” Registry on Nonprofits or Professional Fundraisers Acting on Their Behalf When Communicating Non-Commercial Messages Would be Unconstitutional**

The Commission also requests comment on “any disadvantages. . . to establishing a national do-not-call list including whether the concerns noted by the Commission in declining



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to adopt a national do-not-call list in 1992 remain persuasive today.”” Notice. 67 FED. REG. at 62676, para. 42. The Coalition believes that the concerns articulated by the Commission in 1992 regarding the scope and administrative, technological and financial impracticalities of a national “Do-Not-Call” registry apply with equal, if not greater, force today. There is substantial evidence that a national “Do-Not-Call” registry would involve massive implementation and administrative costs that in all likelihood will be passed to consumers. Notice, 67 FED. REG. at 62676, para. 41 (citing record findings supporting conclusion not to implement a national “Do-Not-Call” registry)

Moreover, the Commission previously concluded it was neither feasible nor preferable to implement a national “Do-Not-Call” registry in light of the “constitutional standards applicable to government regulation of commercial speech.” Notice. 67 FED. REG. at 62675-76, para. 40. Although the infringement of the *commercial speech* rights of telemarketers cannot be justified unless narrowly tailored and no more extensive than necessary to serve a legitimate government interest, an infringement of the *non-commercial speech* of members of

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<sup>11</sup> Because the TCPA nonprofit exemption does not require members of the Coalition to comply with the current TCPA “Do-Not-Call” restrictions, the Coalition’s comments are intended to inform the Commission of the fundamental constitutional problems presented by a potential decision to require nonprofits or professional fundraisers acting on their behalf to comply with a revised do-not-call registry.

the Coalition as a result of the TCPA must survive more onerous strict scrutiny analysis.” It cannot satisfy this high threshold

**As** applied to nonprofits and professional fundraisers acting on their behalf,<sup>13</sup> a national

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<sup>12</sup> Even assuming, *arguendo*, that telephone solicitations by nonprofits or professional fundraisers acting on their behalf are commercial speech entitled to less First Amendment protection under intermediate level scrutiny analysis (an assertion not made by the Commission and rejected by the Supreme Court), a government regulation restricting or eliminating such conduct would be unconstitutional. In *Pearson v. Edgar*, 153 F.3d 397 (7<sup>th</sup> Cir. 1998), the Seventh Circuit held unconstitutional a “Do-Not-Call” registry applicable to real estate solicitations because there was no “reasonable fit” between the state’s interest of protecting residential privacy and the restriction on commercial speech. Applying the less deferential test for restrictions on commercial speech, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980), the Seventh Circuit concluded that the statutory exemptions from the “Do-Not-Call” registry rendered the statutory scheme underinclusive. *Pearson*, 153 F.3d at 404. The court stated that “[w]e can no longer. . . place the interest in residential privacy above the interest in logical distinctions in speech restrictions absent some showing that the restriction reasonably fits the justification.” *Pearson*, 153 F.3d at 404. *Cf. Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) (holding unconstitutional the complete suppression of speech, even commercial speech, based on government’s asserted consumer fraud justification and stating that “when the government chooses a policy of suppression over disclosure. . . government disregards a ‘far less restrictive’ means”) (citation omitted); *New York State Ass’n of Realtors, Inc. v. Shaffer*, 27 F.3d 834 (2<sup>nd</sup> Cir. 1994) (banning solicitation not narrowly tailored); *State of Missouri v. American Blast Fax, Inc.*, Civ. Act. No. 4:00CV933 (SNL) (E.D. Mo. March 13, 2002) (mem. op.) (holding unconstitutional the TCPA’s prohibition against unsolicited facsimile advertisements due to a violation of the First Amendment right to freedom of speech).

<sup>13</sup> First Amendment protections for nonprofit and charitable organizations extend to professional fundraisers acting on their behalf. *See Riley*, 487 U.S. at 796 (“Regulation of a solicitation ‘must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . , and for the reality that without solicitation the flow of such information and advocacy would likely

“Do-Not-Call” registry would be unconstitutional because it would violate the First Amendment right to freedom of speech? In enacting the TCPA, Congress was keenly attuned to the effect of governmental regulation on free speech:

In crafting H.R. 1304, the Committee was sensitive to restraints on its authority to regulate the speech of charitable and political organizations, speech which the Supreme Court has identified as “core” First Amendment Speech. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). As demonstrated above, the Committee found that solicitations by such organizations were less of a problem than commercial calls. It is on this basis that the Committee believes that the scope of the regulation is a workable “commercial speech” distinction consistent with Supreme Court precedent. See *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). Finally, the Committee relied on the research of the American Law Division of the Congressional Research Service and the American Civil Liberties Union to conclude that these restrictions are justified by the magnitude of the problem and that such restrictions remain faithful to Supreme Court precedent on protections to be accorded “commercial speech.”

H.R. REP. NO. 102-317, at 17. Applied here, a decision to eliminate the TCPA nonprofit exemption would not survive strict scrutiny. *Memorial Hosp. v. Maricopa County*, 415 U.S.

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cease. . . . Thus, where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase”).

<sup>14</sup> U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”).

250 n.21 (1974). It would not be narrowly tailored to further a strong interest that the Commission is entitled to protect without interfering with the First Amendment protections of members of the Coalition. *Secretary of the State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 959-61 (1984); *Schaumburg*, 444 U.S. at 636-37. Where, as here, the Commission's regulatory action will impact protected speech, it must employ the least restrictive means to advance the articulated interest. *Sable Communications of Cal., Inc. v. Federal Communications Comm'n*, 492 U.S. 115, 126 (1989). A "Do-Not-Call" registry applicable to nonprofit solicitations would be highly intrusive and well in excess of the least restrictive means required under the Constitution

Still other constitutional problems would be created by extending a "Do-Not-Call" registry to nonprofit solicitations while exempting other specific solicitation calls, for example, religious and political telemarketing and fundraising. This facially discriminatory approach would raise grave equal protection issues." This approach would favor political and religious

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<sup>15</sup> Because a federal statute and regulation are implicated, the equal protections of the Fourteenth Amendment are not triggered directly. However, a violation of the basic equal protections of the Fourteenth Amendment also violates due process under the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The Fifth Amendment. . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process").

speech over fully-protected free speech and, in effect, discriminate against nonprofit and charitable organizations. As the Supreme Court has explained, however, appeals for charitable contributions are inextricably intertwined with the underlying conveyance of information and ideas – that is, speech. *Schaumburg*, 444 U.S. at 632 (“solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease”). These protections are fully vested even where a professional fundraiser is the conduit of the nonprofit and charitable organization’s speech. These speech rights are entitled to the full protection of the First Amendment, and must receive no less protection than political speech or religious discourse

A “Do-Not-Call” registry also would be an unconstitutional prior restraint because it would silence the protected speech rights of nonprofit and charitable organizations prior to publication if charitable solicitations by or on behalf of nonprofit and charitable organizations were subject to the TCPA. There is a heavy presumption against the constitutionality of a prior restraint on speech. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

### CONCLUSION

The TCPA exempts nonprofit and charitable communications. Congress enacted this

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unambiguous statutory exemption because “the two main sources of consumer problems – high volume of solicitations and unexpected solicitations – are not present in solicitations by nonprofit organizations.” H.R. REP. NO. 102-317, at 16. The Commission confirmed the lack of such evidence. Notice, 67 FED. REG. at 62672. para. 23 (“the Commission found no evidence to show that non-commercial calls represented as serious a concern for telephone subscribers as unsolicited commercial calls”). And Congress cautioned the Commission to “consider fully constitutional limitations on any proposed restrictions” that would impact nonprofit organizations. H.R. REP. NO. 102-317, at 16.

The Coalition acknowledges that purely commercial calls, whether initiated by a nonprofit and charitable organization or a commercial enterprise, are subject to less exacting scrutiny under the First Amendment. However, a call by or on behalf of a charity or nonprofit clearly was not intended by Congress to be within the scope of the TCPA where it involves a mixture of non-commercial information (such as the nonprofit’s mission) and some related commercial content incident to a request for charitable support. Thus, the Commission must focus on the message, not the messenger

Based on the foregoing, the Coalition respectfully submits that imposing a “Do-Not-Call” registry on nonprofit organizations and/or professional fundraisers acting on their behalf not only would contravene the intent of Congress in enacting the TCPA, but would harm

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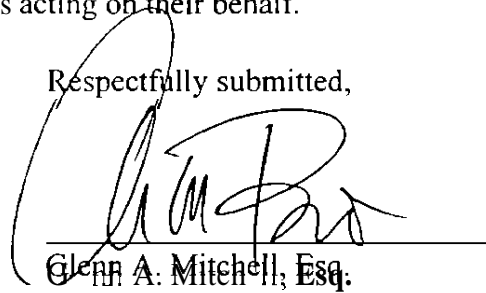
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irreparably the nonprofit and charitable causes supported by members of the Coalition. Moreover, elimination of the TCPA nonprofit exemption would violate the constitutional guarantee to free speech under the First Amendment because, as the Supreme Court has noted, “[w]hether one views this as a restriction of the charities’ ability to speak . . . or a restriction of the professional fundraisers’ ability to speak . . . the restriction is undoubtedly one on speech, and cannot be countenanced here.” *Riley*, 487 U.S. at 798 (internal citations omitted). Thus, the Coalitions request that the Commission not eliminate the TCPA nonprofit exemption, and not impose an unconstitutional national “Do-Not-Call” registry on nonprofit organizations and professional fundraisers acting on their behalf.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Glenn A. Mitchell", is written over a horizontal line.

Glenn A. Mitchell, Esq.

Andrew M. Beato, Esq.

Stein, Mitchell & Mezines L.L.P.

1100 Connecticut Avenue, NW

Suite 1100

Washington, DC 20036

(202) 737-7777

***Counsel for The Not-For Profit and  
Charitable Coalition***

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